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IN THE

Supreme Court of the United States

No. 613—October Term, 1958

THE ST. REGIS TRIBE OF MOHAWK INDIANS,
Petitioner,

v.

THE STATE OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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We oppose the granting of the petition because we maintain that the decision of the New York Court of Appeals (5 N. Y. 2d 24, 152 N. E. 2d 411; reargument denied 5 N. Y. 2d 793, ____ N. E. 2d ____) rests on more than one non-federal ground adequate to support it.

(1)

The power of New York State to take the lands of the St. Regis Indians is not at issue. The decision below was adverse to them because (1) they failed to prove they had title to the lands appropriated, title having been conveyed by the Indians to the State, if not in 1796, as is arguable, then certainly not later than 1856—the fact of the conveyance by the Indians to the State in 1796 being implicit in the language of the Court below (5 N. Y. 2d 24, at p. 40) to the effect that the 1856 transaction "was not the negotiation of a *new* purchase of property from an Indian

tribe, but rather *the adjustment of a claim* that had arisen as the result of the ambiguous language of the 1796 treaty." (Italics ours); and (2) the claim before the Court was an attempt by the St. Regis Indians to be paid a third time for the same conveyed lands.

(a)

The 1796 Treaty contains the following language in its Preamble (R. 67):

> "The Agents for the State having in the presence and with the approbation of the Commissioner proposed to the Deputies for the Indians the Compensation hereinafter mentioned for the extinguishment of their Claim to all Lands within the State and the said Deputies being willing to accept the same. * * *"

The consideration is set forth at R. 67-68 and was upwards of Twelve hundred pounds.

(b)

The Indians petitioned the Legislature in 1856 to be paid again for the same lands, and the Legislature, not having before it all the information about the sale of these Indian lands that subsequent researches of historians (and lawyers) have made available—this additional material being in the instant record to the extent that it is relevant—authorized a payment to the Indians of $5960. N. Y. Laws 1856, ch. 121 (R. 75).

After 102 years, there is a presumption of payment, and the Court of Appeals so held, 5 N. Y. 2d, at p. 39, citing *Bean* v. *Tonnele*, 94 N. Y. 381, 386 (1884), and other authorities.

No wonder that the Court below ruled against this attempt to be paid a third time, in an opinion the gist of which is as follows (5 N. Y. 2d, at p. 40):

"In any event, we have here the situation where the State of New York duly negotiated the Treaty of 1796 with various Indian tribes, including the St. Regis Tribe, in the presence of a Federal Commissioner. Thereafter a dispute arose over the meaning and application of the terms of that treaty. Certainly the State had the right to settle this dispute under that treaty through a legislative grant of compensation (see N. Y. Const., art. I, § 13). Thus this was not the negotiation of a new purchase of property from an Indian tribe, but rather the adjustment of a claim that had arisen as the result of the ambiguous language of the 1796 treaty."

(2)

The attempt to spell out of this case questions worthy of this Court's attention because of the current controversy between New York and another Indian tribe, viz., the Tuscaroras (see Docket Nos. 384 and 386, October Term, 1958) is disingenuous and should not succeed.

The 1796 Treaty was signed in the presence of a federal commissioner (R. 66), and no question could possibly arise at this late date as to its conformity with the Act of March 1, 1793, § 8 (1 Stat. 330). The questions raised at p. 10 of the instant petition simply do not arise in the St. Regis case, but only (and less extensively than petitioner contends) in the Tuscarora case.

(3)

The elaborate discussion (Pet. Br., 16-17) of the Report of the Commissioners under the Treaty of Ghent (1814) has no bearing on the Treaty of 1796. The Report (R. 58-65) merely established the fact that the lands which the Indians conveyed always were in the State of New York; and whether we say that the disputed land has belonged to the State (and not the St. Regis Indians) since 1796, or

since 1856 completely freed of claims arising out of alleged ambiguities in the 1796 treaty, it is certain that the Report determined factual rather than legal issues, and did so in such a manner that the Legislature was able to come to terms with the Indians in 1856 and put an end to what had at most been a very doubtful claim. Such was the view of the Court of Appeals in the passage (5 N. Y. 2d, at p. 40) quoted *supra*, and it is amply supported by the record.

But whether the Indians surrendered their title in 1796 or in 1856 does not depend upon the proper resolution of a *federal* question.

(4)

The petitioner has never satisfactorily explained its century of delay in starting its program of assailing the 1856 settlement. This lapse of time strengthens the presumption of payment. *Bean* v. *Tonnele*, 94 N. Y. 381, 385-386 (1884); *Conkling* v. *Weatherwax*, 181 N. Y. 258, 267, 73 N. E. 1028 (1905).

Lapse of time also defeats the argument that the 1856 statute contravenes the Act of Congress known as the Indian Intercourse Act. It should be remembered that the Indians took the initiative and petitioned the Legislature for the relief embodied in the statute (R. 203, *et seq.*). When they decided to reverse their position, to attack the statute and to undo everything that had been done under it, common sense and fairness would seem to require that the asserted right of rescission be exercised promptly; and a delay of a century is hardly consistent with promptness. The principle, moreover, should be applied with special rigor when the attack tends to disturb the repose of titles.

The point is discussed in a well-reasoned opinion of the Supreme Court of Michigan, *Wall* v. *Zynda*, 283 Mich. 260,

278 N. W. 66, 114 A. L. R. 1521 (1938), where the Court said (p. 265):

> "In many cases the right to have rescission has been held to have been lost by laches within a much shorter period than the six-year statute of limitations. It is obvious that a prolonged period of time within which to bring an action for rescission would be quite incompatible with the character of the relief sought. A party asking restoration of the *status quo* for obvious reasons should be required to move promptly. Equity will not permit one possessed of a right of rescission to delay unduly in the exercise of that right and while so doing speculate on the outcome of the transaction at the risk of his adversary."

The law's reluctance to allow litigants to "put off action [*i. e.*, rescission] so as to speculate upon the outcome" was similarly stressed in *Shiverick* v. *Bonsall*, 185 App. Div. 338, 345, 173 N. Y. Supp. 90 (1918). And see 55 AM. JUR., tit. Vendor and Purchaser, § 623.

Obviously when regard is had to the fact that the petitioner now puts a value of $33,800,000 (R. 236-237) on lands it sold for $5960 in 1856 (R. 75, 79), the petitioner's addiction to speculation is established.

CONCLUSION

The petition for certiorari should be denied.

January 17, 1959.

Respectfully submitted,

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